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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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Appellants appeal from the judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered on October 18, 1973, denying Appellants'

application for preliminary and permanent injunction and dismissing the Complaint and Petition for Injunction and Declaratory Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Alabama, Southern Division, is not yet reported. A copy of the Opinion and Order of the three-judge court by District Judge Pointer is attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1343(3) and 2201, based on a cause of action under 42 U.S.C. § 1983. A three-judge court was requested to be convened pursuant to 28 U.S.C. §§ 2281 and 2284 to enjoin the use by Appellees of certain Alabama statues as unconstitutional. The Opinion and Order of the three-judge district court was entered on October 18, 1973. The Notice of Appeal is attached hereto as Appendix B. The jurisdiction of the Supreme Court to review the decision of the district court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

Whether the Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971) requirements for

injunctive and declaratory relief were correctly applied where no criminal proceeding was pending in the state court to close the premises.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Alabama Nuisance Statutes, Alabama Code, Title 7, Sections 1091-1108 and Alabama's Obscenity Statute, Title 14, Sec. 374. The pertinent provisions thereof, along with the pertinent provisions of the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States* are attached hereto as Appendix C.

STATEMENT OF FACTS

One of the appellants, Herbert Jenkins, Jr., on the behalf of the State of Alabama, filed a suit dated March 7, 1973, In Equity, being case No. 177-199, against MTM, Inc., Chester McKinney, Thomas McGary and fictitious parties, seeking to permanently enjoin the maintenance of a nuisance at the Pussycat Adult Theatre of 7610 – 1st Avenue North in the City of Birmingham under Title 7, Sec. 1091 et seq., Code of Alabama 1940 (Recompiled 1958). The nuisance alleged consisted of repetitive acts which purportedly cummulated to a nuisance. The alleged repetitive acts were numerous convictions (none of which is final) for violation of the obscenity laws of the City of Birmingham for showing obscene movies and selling obscene matter at said premises. The action was instituted pursuant to the State statute specifically Sec. 1107 of Title 7. (See Appendix C.)

A hearing in State Court was held on May 24, 1973 on the Plaintiff's Application for a Temporary Injunction and Issuance of a Restraining Order; an order was issued granting a Temporary Injunction Closing the Pussycat Adult Theatre, (see Appendix D). The present action was filed on May 3, 1973, seeking to have the Federal Court enjoin the enforcement of the Temporary Injunction issued by the State Court judge and to have the State statute under which it was granted declared unconstitutional as written and/or as applied.

The requisite three-judge court was requested pursuant to *28 U.S.C. §§2281* and *2284*. The Appellees sought to utilize an *Alabama statute, Title 7, Section 1107* which declared that the use of any premises in violation of any of the provisions of the *Criminal Code of Alabama* shall constitute a public nuisance.

The statutory provisions of *Alabama Code, Title 7, Sections 1091-1108* inclusively, were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds as well as being violative of their due process and, further, because they do not warrant a nuisance action either by manner of dissemination or unwarranted intrusions into the public's privacy. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *80 Drive-In v. Baxley*, 478 F.2d 611 (1972) (drive-in theatre viewable to the public from the main road).

Title 7, Sections 1091-1108 were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the *First Amendment* of a kind condemned by the Supreme Court in an unbroken line

of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and others. The statutes were also attacked as denying due process and equal protection in that the statutes make a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 1532. It was further attacked as denying *Fifth* and *Fourteenth Amendment* rights to have every element making up a nuisance to be proven by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

The Appellant operated a book store and retail store combination in the City of Birmingham on property appropriately zoned. These public organizations were engaged in the sale and/or exhibition of books, magazines, newspapers, motion picture films and other materials which are presumptively protected by the *First Amendment* to the *Constitution* of the *United States*.

The publications offered for sale and/or exhibition by the Appellant are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as

well as state appellate courts, and hence, are protected expression under the *First Amendment* to the *United States Constitution*. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or movies distributed or exhibited by the Appellant, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

Separate convictions have been obtained for obscenity against employees of the Appellants for distributing or exhibiting obscene material upon the premises owned by the Appellants. All convictions are on appeal and no judgment is final as of this writing. The three-judge panel dismissed the action and refused to grant injunctive relief on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). The Court held that the propriety of federal intervention in the circumstances presented had been decided by the Fifth Circuit Court of Appeals in *Palais v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did

[1] The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, customs and city ordinances within the City of Birmingham, Alabama of harassment and bad-faith prosecutions, under facially invalid statutes and ordinances, attempting the ultimate suppression of presumptively protected publications, motion pictures and materials without, to this date, ever having had any final judicial determination that any of said publications, motion pictures or materials are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional

not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The Court dismissed the complaint and did not abstain, thereby retaining jurisdiction. The effect of the words of the decision was founded on abstention. However, the act of the three-judge panel in dismissing the case without retaining jurisdiction appears to be an adjudication on the merits.

In that the majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases[2] as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the action was dismissed and this appeal follows.

(Footnote 1 Continued)
enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights, as well as the right of interested adult citizens of the City of Birmingham and the State of Alabama, and of the other forty-nine states who may visit Alabama and who wish to exercise their *First Amendment* right to buy, review and view non-obscene publications and films. The frantic efforts on the part of Defendants to close Plaintiffs' businesses and the threatened closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and which might be apropos in a police state, but is anathema to a free society such as our.

[2] *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 79 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

THE QUESTION IS SUBSTANTIAL

The question presented herein is virtually identical with that presented in *Speight, et al v. Slaton, et al,* No. 72-1557, Probable Jurisdiction Noted October 16, 1973, argued January 7 and 8, 1973.

This Court is now also considering the following question in *Steffel v. Thompson,* No. 72-5581:

> "Did the Court below correctly apply the *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971) standards to deny petition *declaratory relief* in a situation which did not involve a pending State criminal prosecution?"

This case was argued before the Court on November 13, 1973 and according to published reports the questioning of the Court related to whether or not the principles of *Samuels v. Mackell,* 401 U.S. 66 (1971) bar declaratory judgment intervention when no prosecution is pending and the attack is on a statute "as applied." Mr. Justice White also raised the question that if that were so, would there not also be a case or controversy problem which may bar declaratory relief.

The question presented in the case at bar relates to whether or not the *Younger v. Harris,* supra and *Samuels v. Mackell,* supra requirement apply to deny petitioners *injunctive and declaratory relief* in a situation which did not involve a pending State criminal prosecution.

It may well be that the decision of this Court in the Steffel case or the Speight case may not adequately answer the question posed by counsel. Unlike Speight, the State Court has closed the premises occupied by one of the Appellants and the same has been remained closed by Order of the State Court since March of 1973, almost one full year.

This case raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not expressly decided by *Younger v. Harris, supra,* which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Stewart in *Younger v. Harris,* 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court in the case at bar, while recognizing explicitly the fact that *Younger v. Harris,* supra, and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe,* 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws."* (Emphasis supplied.)

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Circuit Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144.

The Circuit Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins*, N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Circuit Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Section 22-a of the New York Code of Criminal Procedure was upheld because it had procedural safeguards. The Alabama procedure has none.

In a case similar to this one, decided after *Younger v. Harris*, supra, and its companions, this Court ruled that 42

U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster*, 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

Assuming, *arguendo*, that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra*, is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra*, "significantly affect a state's enforcement – by whatever means – of its criminal laws." 466 F.2d 1230 at 1233. The pending criminal prosecutions will remain pending no matter what the disposition of this case. Thus the instant case cannot be characterized as civil enforcement of criminal laws. Appellee's complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and

> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a constitutionally relevant justifiable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at ____

The separate opinion referred to is that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Mackell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra*.

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, 411 U. S. 564, (1973). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending actions is applicable here.

This Court unanimously held that a predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra,* in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district

court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

The *Pursue, Ltd.* case is not unknown to this Court, in that the following has occurred with respect to said case:

A. On or about May 23, 1973 Petitioners Huffman and Fair filed the following documents in this Court:

(i) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof; Docket No. 72-1613 Misc.

(ii) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(iii) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction.

B. On June 12, 1973, Petitioners' Application for Stay, No. A-1199, presented to Mr. Justice Stewart, was denied.

C. On June 25, 1973 this Court entered the following order in the instant matter:

> "The application for stay or writ of injunction presented to Mr. Justice Stewart and by him referred to the Court and the motion to advance are denied. The motion of Pursue, Ltd., to participate as a party respondent is granted."

D. On or about July 5, 1973 James J. Clancy, Attorney for Petitioners applied to the Court for an extension of time (No. A-53, Re: *Huffman, et al v. Pursue, LTD*) in which to docket an appeal from the opinion and order of April 20, 1973.

E. On July 9, 1973 Mr. Justice White signed an order extending the time for docketing an appeal to and including August 14, 1973.

F. On or about August 14, 1973 a Jurisdictional Statement was filed in this Court appealing the Opinion and Order of the statutory three-judge court on April 20, 1973, docketed as *Huffman et al v. Pursue, LTD* No. 73-296 on this Court's calendar which Jurisdictional Statement is for the most part identical in substance to the Petition for Writ of Mandamus or Prohibition.

G. On September 17, 1973 Pursue, LTD, Respondent herein, filed a Motion to Dismiss or Affirm, and no action has been taken by the Court in No. 73-296.

H. On or about October 23, 1973, *Pursue, Ltd.* as respondent filed a Response in Opposition to Petition for Writ of Mandamus or Prohibition in case No. 72-1613 Miscallaneous.

I. On or about November 12, 1973 this Court denied the Petition for Writ of Mandamus or Prohibition in No. 72-1613.

5. There is no remedy available to Appellants in the state courts of Alabama. It is also true that the decisions of the Courts of Alabama have already approved the use of the public nuisance approach to the regulation of "obscene" materials.

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore or theater under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees, in their Complaint to close the Appellants' store and theater as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the further operation of the Appellants' businesses.

It has been well recognized by this Court that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line ... Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards ... is ... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks ...'. *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963)." *Blount v. Rizzi*, 400 U.S. 410, 416, 417 (1971).

See also: *Heller v. New York*, 413 U.S. 483, (1973) and *Roaden v. Kentucky*, 413 U.S. 496, (1973).

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated ... is finely drawn ... [t]he separation of legitimate from illegitimate speech calls for ... sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the premises, by closing their doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights.

> Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Birmingham is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

The proposed injunction, it should be noted, does not enjoin the sale or distribution of specific materials shared as "obscene" instead, by closing the store, it enjoins the sale of any press materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments.* First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall,* 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

"In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C.* §*1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of §*1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending §*1461*, and enacting a second banning material with obscene matter on its face and – unlike §*1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter." (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

A recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* ____ F. Supp. ____ (No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

In another case out of the U.S. District Court for the Western District of Tennessee, Western Division, entitled AIRWAYS THEATRE, INC. and SOUTHLAND THEATRES, INC., Plaintiffs, v. PHILIP M. CANALE, District Attorney General, DAVID M. PACK, Attorney General of Tennessee and WINFIELD DUNN, Governor of the State of Tennessee, Civil C-73-262, filed November 19, 1973, the court held that Tennessee's nuisance statute was unconstitutional. The statute was held to be unconstitutional by this unanimous three-judge panel for at least two reasons; one of which related to the definition of places of nuisance, which could be applied to include one's home and secondly, that

> "seizures of press materials, fixtures, furnishings and equipment and stock used in or in connection with the maintaining or conducting of a nuisance, shall be subject to seizure immediately upon detection by any law enforcement officer ... thus, once there is a determination of obscenity by a law enforcement officer, seizure of the property may take place."

The three-judge court held that the procedure flew in the face of the decision of the U.S. Supreme Court in *Roaden v. Kentucky, supra.* (Opinion attached hereto as Appendix E.)

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State*, 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

"The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

"The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.

"Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."

"The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

> "We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Riviera Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

> "ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . ."

The Court condemned this order succintly and directly:

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

> "ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

> "This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

> "Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene.' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

> material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra,* to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

> "28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625." *Marcus v. Search Warrant, supra,* at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra,* and the Missouri procedure which are also relevant to the Georgia procedure:

> "*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.,* 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunction would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendants herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek, not a determination that certain named publications are obscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Appellants without regard to the effect upon protected speech and the rights of the citizens of Alabama and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The United States Supreme Court in the case of *Paris Adult Theatre I v. Slaton, et al,* 413 U.S. 49, (1973), held that a procedure which sought to condemn as obscene a single named film comported with constitutional requirements as the same procedure was applied in that case provided, the Court said, that the definition of obscene was not otherwise void for vagueness (the so-called *Roth-Memoirs* test) and incorporated by authoritative judicial construction or legislative enactment the standards set forth in *Miller v. California,* supra. In fact, including footnote 4, the majority of the Court suggests that his procedure is emanately fair when undertaken in the context therein prior to the institution of any criminal proceedings, and that the procedure would be even more fair if the disseminator had an opportunity to question the obscenity of the materials in a declaratory judgment forum prior to dissemination. The language of the decision and the footnote makes it clear that the Court was examining the Georgia procedure as it related to the prohibition of a specific film and/or films, and not to a general total and complete restraint on all films, whether first determined to be obscene or not.

In fact, this Court suggests that all press materials are presumptively protected until there is a judicial determination of obscenity in the opinion of the majority in *Roaden v.*

Kentucky, supra. In this case we are dealing with an Alabama statute which authorizes, independent of any criminal proceeding, the closing of a bookstore or theatre as a public nuisance. If such is allowed to occur, then those who disseminate and exhibit adult materials would have to engage in the kind of "self-censorship" that would result in a "chilling of speech" that would ultimately have the effect of depriving adults of our society from access to non-obscene books which deal candidly with the subject of sex – a mysterious and powerful force in society.

Thus, we think the special circumstances exist that justify this Court confining the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra to the specific holdings in those cases, and this Court should not permit the doctrine to be extended to encompass the category of proceedings which relate to State imposition of civil sanctions to defeat the jurisdiction of the federal forum to litigate federal constitutional rights.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore and theatre without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Clearly, this impermissible prior restraint justifies relief in a federal forum when sought by a proper party. *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

An amusing comment on this Younger problem was addressed by Judge Aldersit, concurring in *Roy v. Jones*, CA-3 (8/28, 1973) 42 LW 2158, wherein he stated as follows:

> "The fundamental equitable concepts of *Younger* must never be subordinated. Thus, one piece of the *Younger* factual complex must not become the

subject of controlling emphasis to the exclusion of the important legal principles constituting the rationale of the case. An example of this is the suggestion that the root premises of *Younger* do not lie where there is no on-going State proceeding. While the contempor-enity [sic] of the State action may indeed be extremely important, this is but one factor and this one factor must not be considered in vacuo ... if the presence of an on-going State proceeding is critical, so is the necessity of proving entitlement to an immediate injunction. So understood, there is a delightful 'Catch-22' quality about it all:

"Plaintiff: Aha, you can't apply *Younger* because there is no on-going State proceeding ...

"Defendant: Aha to you Sir; if there is no on-going State proceeding then why do you need an injunction? What's there to enjoin? ..."

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a business provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a determination on Appellants' Constitutional claims.

Repsectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

GENERAL CORPORATION, FIRST AMENDMENT FOUNDATION, INC., and CINEMA THEATRE OF HUNTSVILLE, INC.,

Plaintiffs

v.

EUGENE SWEETON, CHARLES H. YOUNGER, JOHN D. SNODGRASS, and CITY OF HUNTSVILLE,

Defendants

MTM, INC., an Alabama corporation; and MOBILE BOOKMART, INC., an Alabama corporation,

Plaintiffs

Civil Action No. 73-194-NE

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

Before RIVES, Circuit Judge, and McFADDEN and POINTER, District Judges.

POINTER, District Judge:

Positing jurisdiction under 28 U.S.C. §§ 1343(3) and 2201, plaintiffs filed these actions under 42 U.S.C. § 1983, seeking injunctive and declaratory relief from state court orders, entered pursuant to Alabama nuisance statutes, Alabama Code, Title 7, §§ 1091-1108[1], enjoining the operation of several theatres and book stores. These two cases were consolidated pursuant to Rule 42, F.R.C.P. A three-judge court was constituted to hear the consolidated cases, which are now submitted for decision on the merits and on motions to dismiss.

At the outset this Court must determine the propriety of federal intervention in state court proceedings in these cases. Principles of equity, comity and federalism dictate that state court proceedings remain free from federal court intervention, except in cases where plaintiff can show the existence of "special equities" that justify intervention.[2] *Younger v.*

[1] These statutes were designed to deal with places of "lewdness, assignation, or prostitution." Defendants herein have used these statutes to deal with places where obscene material is allegedly shown or distributed.

[2] We decline to await the Supreme Court's decision on the appeal from *Pursue Ltd. v. Huffman*, _____F.2d_____ (W.D. Ohio 1973, C72-432, Apr. 20, 1973). The *Younger* problem was not dealt with by the District Court in that case, presumably due to the lack of identicality of parties in the state and federal cases. Nor do we consider the Supreme Court's summary remands on June 25, 1973, of a number of cases, including *Grove Press, Inc. v. Bailey*, 318 F. Supp. 244 (N.D. Ala. 1970) and *Spivak v. Shriver*, 315 F. Supp. 695 (M.D. Tenn. 1970), for "further consideration in light of *Miller v. California* _____ U.S. _____ (1973)" etc., without mentioning *Younger*, as overruling *Younger*.

Harris, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). The *Younger* case and its progeny can be considered as merely restating traditional principles applicable to both civil and criminal cases. 401 U.S. at 43-45; *Lynch v. Snepp*, 472 F.2d 769 (C.A.4, 1973). The Fifth Circuit has not yet been squarely faced with the question of whether or not *Younger applies to purely civil proceedings; however, it has found Younger* applicable to matters which, though labelled civil, have significant implications for a state's enforcement of its criminal laws. *Duke v. Texas*, No. 71-2845 (C.A.5, April 20, 1973); *Palaio v. McAuliffe*, 466 F.2d 1230 (C.A.5, 1972). See *American Radio Ass'n v. Mobile Steamship Ass'n*, _____F.2d_____ (C.A.5, No. 72-3803; August 22, 1973). *Cf. Hobbs. v. Thompson*, 448 F.2d 456 (C.A.5, 1971). Other circuits have indicated that *Younger* does apply to civil matters. *Cousins v. Wigoda*, 463 F.2d 603 (C.A.7, 1972), *application for stay denied* 409 U.S. 1201 (Rehnquist, Circuit Justice); *Lynch v. Snepp, supra.* We need not now reach this question, since we conclude that the state proceedings here in question complement, or serve as a substitute for, the criminal laws of the state.[3]

What then does *Younger require? As stated by the* Supreme Court in the more recent case of *Mitchum v. Foster*, 407 U.S. 225, 230 (1972):

> In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference

[3] Compare the situation in *80 Drive-in v. Baxley*, 468 F.2d 611 (C.A.5, 1972), wherein the Fifth Circuit had before it a matter which it indicated was purely civil in nature. That matter involved Alabama's general nuisance statutes, Alabama Code, Title 7, Article 1 of Chapter 31, whereas we are now faced with an application of Article 2 of Chapter 31, dealing with places of lewdness, assignation and prostitution as public nuisances. Note that § 1107 of Article 2 requires certain state officials to institute nuisance proceedings where nuisance has been established in a criminal proceeding, a criminal verdict of guilty being conclusive in the civil action. *See also, Ridge v. State*, 206 Ala. 349, 89 So. 742 (1921).

> with state criminal prosecutions." 401 U.S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances – where irreparable injury is "both great and immediate," 401 U.S., at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, or where there is a showing of "bad faith, harrassment, or . . .other unusual circumstances that would call for equitable relief." 401 U.S., at 54.

In the present cases the plaintiffs have failed to demonstrate that the state court actions have been instituted in bad faith or to harrass. Compare *Cameron v. Johnston*, 390 U.S. 611 (1968) with *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Plaintiffs are not being threatened with multiple prosecutions – indeed, the essence of their complaint here is that they are not. *Cf. Younger v. Harris*, 401 U.S. at 47 ("the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution").

There is an insufficient showing that plaintiffs will suffer irreparable injury if consigned to their state court remedies. In Alabama permanent injunctions are appealable, and temporary injunctions may be made appealable by appropriate motions, and both types of appeals are given expedited, preferential treatment by statute.[4]

---

[4] See Alabama Code, Title 7, §§ 757, 1057 (Recomp. 1958). The plaintiffs in the federal court cases have had, have, or can have viable appellate rights (though it appears that at least two of the plaintiffs have elected to let the time for appeal expire).

There is a question as to whether the Alabama nuisance statutes here in question are "'flagrantly and patently violative of express constitutional prohibitions.'" *Mitchum v. Foster, supra.* However, it is quite possible that the Alabama Supreme Court might construe these statutes as inapplicable to motion picture theatres and book stores, obviating any federal constitutional question.[5] If a constitutional question remains after the statutes have been authoritatively construed, such question can be decided by the Alabama Supreme Court upon the same appeal.

On balance, we conclude that the plaintiffs have failed to show any of the exeptional circumstances required by *Younger* and that accordingly it is the duty of this Court to dismiss these cases.[6] Dismissal is, of course, without prejudice to any rights plaintiffs may have in the Alabama courts; and we intimate no opinion as to the merits of these cases.

---

[5] Note that the Georgia statute involved in *Speight v. Slaton*, 356 F.Supp. 1101 (N.D.Ga. 1973), on appeal to the Supreme Court as #72-1557, is specifically directed at obscenity and, unlike the Alabama statute, calls for destruction of the materials, even those which would be held not obscene. In *Speight* the state admitted that not all the materials sought to be seized were legally obscene; in the present case the posture of governmental officials apparently is that each and every film or book is legally obscene. Moreover, in *Speight* there was apparently "no way to construe abatement of a public nuisance to avoid the [claimed] constitutional infirmity" and the Georgia Supreme Court "may have already approved of the use of the public nuisance approach to closing down activities involving 'obscene' materials." (Judge Morgan dissenting in *Speight*, 356 F.Supp. at 1107, 1108.) We have not been advised of any like approval by the Alabama Supreme Court. Due to the differences in the cases it is doubtful that a reversal by the Supreme Court in *Speight* would be controlling on the cases here.

[6] We note our conclusion that these cases require the action of a three-judge court, 28 U.S.C. §§ 2281, 2284, even where the only action taken is dismissal for reasons of guilty, comity and federalism.

For the foregoing reasons, it is ORDERED, ADJUDGED and DECREED that the above-styled cases be, and the same hereby are, dismissed, each party to bear his own costs.

DONE, this the 18th day of October, 1973.

/s/Richard T. Riva
United States Circuit Judge

/s/Sam C. Pointer, Jr.
United States District Judge

/s/Frank McFadden
United States District Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation;
and MOBILE BOOKMART, INC.,
an Alabama Corporation,

Plaintiffs

v.

WILLIAM J. BAXLEY, in his capacity
as Attorney General for the State
of Alabama; EARL C. MORGAN, in his
capacity as Prosecuting Attorney for
the Tenth Judicial Circuit of the
State of Alabama; and HERBERT JENKINS,
JR., in his capacity as Assistant City
Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFadden, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
FERRIS S. RITCHEY, JR.

By: /s/ Ferris S. Ritchey, Jr.
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APPENDIX "C"

FIRST, FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, Alabama Code, Title 7, Sec. 5. 1091-1108

FIRST AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 374(1). **Title of chapter.** – This chapter shall be known as the Alabama Law on (Obscenity and may be referred to by that designation. 1961. p. 1310. § 1 signed Sept. 8, 1961.)

§ 374(2). **Purpose of chapter.** – The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this state. The elimination of this evil and the consequent protection of the citizens and residents of this state against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this state. (1961, p. 1310, § 2, appvd. Sept. 8, 1961.)

§ 374(3). **Definitions.** – The following words, terms and phrases used in this chapter shall, for the purpose of this chapter, have the meaning respectively ascribed to them in this section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States, or (b) any other printed or written matter or material which has not been determined to be nonmailable under thy laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution. (1961, p. 1310, § 3, appvd. Sept. 8, 1961.)

§ 374(4). **Importation, sale or possession of obscene printed or written matter; penalties.** – (1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene printed or writter matter or material, *other than mailable matter*, or any mailable matter known by such person to have been judicially found to be obscene under this charter, shall be guilty of a misdemeanor and, upon

conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, and sentenced to hard labor for the county, for not more than six months, and may be fined not more than five hundred dollars for each offense, or be imprisoned and fined in the discretion of the court. (1961, p. 1311, § 2 appvd. Sept. 8, 1961.)

§374(5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed. – Whenever the solicitor in any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution, or is (2) in this state, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court or any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter (1961), p. 1311, §5, appvd. Sept. 8, 1961.)

§ 374(6). **Same; complaint. – The action authorized by** section 374(5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description; (b) allege its obscene nature; (c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away or processing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; (d) pray for an adjudication that it is obscene; (e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale commercial distribution, or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away, and (f) pray for its surrender, seizure and destruction. (1961, p. 1312, § 6 appvd. Sept. 8, 1961.)

§ 374(7). **Same; dismissal; temporary injunction; order to show cause; service of process.** – Upon filing of the complaint, described in section 374(6), the solicitor or register of the court shall present the same, including the exhibit thereto, as soon as practicable to the court for the examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to

show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial office as shown therein. Service of such order may be made in any manner provided by law and in case of mailable matter published or edited outside the state of Alabama and of any nonresident respondent, by registered or certified mail directed to the mailable matter or the respondent to be deemed to be prima facie evidence of service of such order upon the mailable matter or any respondent for the purposes of this section. (1961, p. 1312, § 7, appvd. Sept. 8, 1961.)

§ 374(8). **Same; appearance, answer and trial date; order on default.** – (1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may appear and file defensive pleadings.

(2) The court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other respondents, the court shall set a date for the trial of the case. (1961, p. 1313, § 8, appvd. Sept. 8, 1961.)

§ 374(9). **Same; speedy trials; rules of procedure.** – The public interest requires that all actions prescribed by this chapter, other than criminal actions under section 374(4), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements,

including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the court finds the same to be in the public interest. (1961, p. 1313, § 9, appvd. Sept. 8, 1961.)

§ 374(10). **Same; decree; enforcement.** – In the event the court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof,

(a) enter a permanent injunction against any respondent, prohibiting him from doing or continuing to do any thing condemned by this chapter;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable.

(c) direct all sheriffs in the state to seize and destroy all such obscene mailable matter in the possession or under the control of any respondent who shall fail to comply with the court's order.

(d) enter any other and appropriate orders to effectuate the decree or injunction (1961, p. 1313, § 10 appvd. Sept. 8, 1961.

§ 374(11). **Same; contents and effect of objections; service of copies of orders.** – Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms and describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all respondents named in the complaint and in the manner as provided in section 374(7) of this chapter. (1961, p. 1314, § 11, appvd. Sept. 8, 1961.

§ 374(12). **Importation, sale or possession of mailable matter found obscene.** – Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this state for sale or commercial distribution, or which in this state is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of section 374(4) of this chapter. (1961, p. 1314, § 12, appvd. Sept. 8, 1961.)

§ 374(13).**Violation of injunction.** – Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to sections 374(10) and 374(11) of this chapter, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court. (1961, p. 1314, § 13, appvd. Sept. 8, 1961.)

§ 374(14).**Extradition of person in another state charged with continuing violation.** – In all cases in which a court has entered its decree pursuant to section 374(10) that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a respondent to such decree, who cannot be found in this state, the governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found

pursuant to the laws of this state. (1961, p. 1315, § 14, appvd. Sept. 8, 1961.)

§ 374(15). **Presumption from possession of obscene matter; burden of proof.**– The possession of any three of the things enumerated in section 374(4) of this chapter (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. (1961, p. 1315, § 15, appvd. Sept. 8, 1961.)

§ 374(16). **Nonresidents and others importing obscene matter submit to jurisdiction of courts.** – In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside of this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons, including non-residents, who are responsible for the importation of such matter into this state and, by such act, submit themselves to the jurisdiction of the court of this state and any action authorized by section 374(5) of this chapter. (1961, p. 1315, § 16, appvd. Sept. 8, 1961.)

§ 1091. **(9280)** Definitions.–For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

* * *

§ 1092. **(9281) Maintaining nuisance; definition of.**—Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed or in control of any such nuisance by any such owner, agent or lessee, all for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. **(9282) Injunction of nuisance.**—Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

* * *

§ 1094. **(9283) When injunction issued before hearing.**—No injunction or restraing order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. **(9284) Complaint, filing of; temporary injunction.**—Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of

the pendency of the action, containing the name of the court, the names of the parties, the object of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

* * *

§ 1096. **(9285) Restraining order, inventory of property.**—Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. **(9286) Contempt of court, what constitutes.**—Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

§ 1098. **(9287) Service of complaint, when writ granted.**—A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919, p. 52.)

§ 1099. **(9288) Answer of respondents.**—Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ 1100. **(9289) Final decree, when granted.**—If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decreee restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ 1101. **(9290) Closing of premises, pending final decision.**—If on the hearing for a temporary injunction, it shall further appear that the person owning, in control, or in charge of the nuisance so enjoined has received five days' notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purpose until final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or if not issued, shall include such an order restraining, for such period the removal or interference with the personal

property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919, p. 52.)

* * *

§ 1102. **(9292) Trial of action; evidence; judgment.**—The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilty of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiescence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at

the place complained of and the respondents from maintaining such nuisance elsewhere in the county. (1919, p. 52.)

* * *

§ 1107. **(9296) Nuisance established in criminal action; proceedings under this article.** —In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. **(9297) Contempt proceedings or violation of closing order.**—In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in

the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

APPENDIX "D"

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

STATE OF ALABAMA, ETC.
Complainant

v.

MTM, INC., a corp., et al
Respondents

CASE NO. 177-199

ORDER UPON PRAYER FOR TEMPORARY INJUNCTION

This cause came on to be heard and was submitted upon prayer for a temporary injunction addressed to Respondents as set forth in the Bill of Complaint. The allegations upon which the prayers for relief are based are lengthy and diverse but the apparent purpose thereof is to establish the perpetration of a nuisance by Respondents in their operation of a motion picture theatre and bookstore wherein allegedly lewd and obscene motion pictures and printed publications are offered, by advertisement, to the general public or a portion thereof. The temporary relief sought is (1) the enjoining of Respondents from further maintenance of the said alleged nuisance, (2) The c'osing of the theatre and bookstore pendente lite, and (3) the enjoining of the removal from the said premises of any personal property therein, or the interference therewith.

The Court finds that, as alleged, there have been numerous and repeated past violations of the laws and statutes of the State of Alabama and the ordinances of the City of Birmingham, Alabama, which govern, control

and /or apply to the operation of the said motion picture theatre and bookstore, all in a manner such as to constitute a nuisance.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: Respondents, their servants, agents or employees, are each hereby, separately and severally and conjointly temporarily enjoined from further maintaining such nuisance and any further maintenance thereof or any violation of this Order shall constitute an open contempt of this Court and its solemn Order.

TWO: Said Respondents are further enjoined from removing from the premises of the Pussycat Adult Theatre and Bookstore any and all personal property therein, or the interference therewith.

THREE: The foregoing restraining orders shall continue in effect to abide the further orders and decrees of this Court.

DONE and ORDERED this the 29th day of May, 1973.

Circuit Judge in Equity Sitting

cc: Hon. Herbert Jenkins
Hon. Ferris Ritchey

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AIRWAYS THEATER, INC. and
SOUTHLAND THEATRES, INC.,
Plaintiffs

v.

PHIL M. CANALE, District
Attorney General; DAVID M.
PACK, Attorney General of
Tennessee; and WINFIELD DUNN,
Governor of the State of
Tennessee,
Defendants

CIVIL C-73-262

PER CURIAM

Before: FREDERICK PIERCE LIVELY, Circuit Judge; BAILEY BROWN, Chief District Judge and ROBERT M. McRAE, JR., District Judge.

Plaintiffs Airways Theater, Inc. and Southland Theatres, Inc., operators of "adult" motion picture theaters in Memphis, Tennessee, challenge the constitutionality of Tennessee's obscenity statute, T.C.A. § 39-3003 through 3008, and Tennessee's nuisance statute, T.C.A. § 23-301 et seq. Plaintiffs seek both declaratory and injunctive relief. J urisdiction is based on 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 2201. Since plaintiffs seek to enjoin state officers from enforcing allegedly unconstitutional statutes, a three-judge court has been convened. 28 U.S.C. § 2281.

Plaintiffs contend that the statutory definition of obscenity in § 39-3007 is vague and overbroad in the light of the requirement in *Miller v. California*, _____ U.S._____, 37 L.Ed. 2d 419 (1973), that the sexual conduct prohibited must be specifically defined. Plaintiffs also challenge the procedures established by the obscenity statute for obtaining temporary restraining orders or injunctions, contending that, properly construed, they allow such to be issued without a prior adversary hearing. The nuisance statute is challenged on the grounds that it is vague and overbroad and that it operates as a prior restraint without procedural safeguards.

Defendants rely on the threshold defenses that plaintiffs have not stated an actual controversy, that, as to plaintiff Southland, the existence of a criminal proceeding against it under the obscenity statute prevents the granting of any relief to it with respect to that statute, and that this Court should, applying the abstention doctrine, deny all relief to plaintiffs. Defendants further contend that in any event, properly construed, the involved statutes are constitutional.

We conclude that plaintiffs have stated an actual controversy, but that the existence of a criminal proceeding against plaintiff Southland, together with a proper application of the abstention doctrine, preclude this Court from granting either declaratory or injunctive relief as to the obscenity statute. We do, however, hold that Tennessee's nuisance statute is unconstitutional.

JUSTICIABILITY

We conclude that the facts alleged indicate that there is "a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality . . . ." *Golden v. Zwickler*, 394 U.S. 103 (1969). It is without question that there is an actual controversy as to plaintiff Southland involving the obscenity statute since subsequent to the filing

of this action, Southland was indicted in state court under that statute.[1]

Plaintiffs' other allegations also lead to the conclusion, although it is not without doubt, that there is an actual controversy as to plaintiff Southland involving the nuisance statute and as to plaintiff Airways involving both statutes in question. Plaintiffs have alleged that they are operators of "adult" motion picture theaters and that they have been exhibiting adult motion pictures and desire to continue doing so in a lawful manner. Tennessee's obscenity and nuisance[2] statutes are directed in part at such establishments. It is without dispute that defendant District Attorney General Canale made statements in the Memphis newspapers shortly before this action was filed which indicate that he intends to enforce the statutes in question. In addition, representatives of defendant Canale have at his direction recently attended movies at the Airways Theater. Since plaintiff Southland has been enjoined under this obscenity statute prior to the filing of this action, and subsequent to such filing has been indicted, it is reasonable to conclude in the light of defendant Canale's statements and his representatives' actions that both plaintiffs have "assert[ed] a sufficiently direct threat of personal detriment," *Doe v. Bolton*, 410 U.S. 179 (1973), both as to the obscenity statute and the nuisance statute.

YOUNGER v. HARRIS

Prior to the filing of this action, as indicated, two injunctions had been issued against plaintiff Southland in the

[1] Moreover, prior to the filing of this action, two injunctions had been issued against Southland in state Criminal Court pursuant to the obscenity statute.

[2] The nuisance statute was only recently amended to include lewdness and obscene or pornographic material.

Criminal Court of Shelby County, Tennessee pursuant to T.C.A. § 39-3003. Plaintiff Southland contends, however, that since these injunctions are civil in nature, *Younger v. Harris*, 401 U.S. 37 (1971) does not require that we dismiss this action. We need not reach the question of whether *Younger* proscribes interference in pending state civil actions, for after examining T.C.A. § 39-3003, pursuant to which the injunctions were issued, we conclude that the issuance of injunctions under that section is a first step in a process which looks toward the submission of an indictment to the grand jury, and thus § 39-3003[3] (including that part authorizing the issuance of injunctions) should be regarded as part of a criminal process.

Thus, there having been no allegations by Southland of harassment or bad faith prosecution, *Younger, supra*, requires that this Court not grant that plaintiff injunctive relief as to the obscenity statute and *Samuels v. Mackell*, 401 U.S. 66 (1971) likewise precludes declaratory relief.

ABSTENTION

The Supreme Court of Tennessee, as a result of the remand to it of cases by the Supreme Court of the United States, is presently considering the constitutionality of the Tennessee obscenity statute in the light of *Miller v. California*, ___ U.S. ___, 37 L.Ed. 2d 419 (1973). Although the

[3] § 39-3005 also provides for injunctions, but looks not toward ultimate submission to the grand jury; rather, upon the obtaining of a permanent injunction, it looks to the seizure and destruction of obscene material.

Tennessee statute does not describe specific prohibited sexual conduct,[4] it is possible that the Tennessee Supreme Court might give it such a limiting construction, *e.g.*, as the Supreme Court of the United States construed a federal obscenity statute in *United States v. 12 200-Ft. Reels*, ___ U.S. ___, 37 L.Ed. 2d 500 n. 7 (1973). Similarly the question whether the obscenity statute, insofar as it establishes injunction procedures, can be constitutionally construed is also before the Tennessee Supreme Court. Thus, the doctrine of abstention requires that this Court refrain from granting either plaintiff injunctive or declaratory relief regarding the obscenity statute. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

CONSTITUIONALITY OF THE NUISANCE STATUTE

Since thery is no *Younger v. Harris* or abstention problem as to either plaintiff regarding the nuisance statute,[5] we now consider the constitutionality of that statute. We conclude that the statute is unconstitutional for at least two reasons. In the first place, among the definitions of nuisance in the statute is "any place in or upon which . . . possession of any material determined to be obscene or pornographic . . . [is] carried on or permitted . . . " "Place" is defined in the statute as "any building, room, enclosure or vehicle, or separate part or portion thereof or the ground itself." Thus, possession in one's home of material determined to be obscene or pornographic would clearly make that home a nuisance subject to abatement. Under *Stanley v. Georgia*, 394 U.S. 557

[4] The Tennessee obscenity statute (§39-3007) tracks the language of the Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

[5] It is not contended that there are any pending state actions against either plaintiff under the nuisance statute or that the constitutionality of that statute is challenged in any state court. Moreover, as will be seen, the statute is not subject to an interpretation that would allow it to pass constitutional muster.

(1969), the state's power to regulate obscenity "does not extend to mere possession by the individual in the privacy of his own home." 394 U.S. at 568.

Secondly, the nuisance statute also provides that "[a]ll furnishings, fixtures, equipment and stock, used in or in connection with the maintaining or conducting of a nuisance shall be subject to seizure, immediately upon detection by any law enforcement officer . . . ." Thus, once there is a determination of obscenity by a law enforcement officer, the seizure of the property may take place. In *Roaden v. Kentucky*, ___ U.S. ___, 37 L.Ed. 2d 757 (1973), the Supreme Court overturned a seizure of a film which "proceeded solely on a police officer's conclusions that the film was obscene." A magistrate had not been afforded an opportunity to "focus searchingly on the question of obscenity." 37 L.Ed. 2d 765-66. The Tennessee nuisance statute permits not only seizure of the film or other obscene material, conduct that was proscribed in *Roaden*, but also seizure of furnishings, fixtures and equipment used in connection therewith merely upon determination of obscenity by a law enforcement officer.

It results that plaintiffs' claim with respect to the unconstitutionality of the obscenity statute should be dismissed without prejudice. With respect to the nuisance statute, plaintiffs are entitled to a declaration of unconstitutionality; however, they are not entitled to an injunction against enforcement of such nuisance statute since they have not shown irreparable injury. *Zwickler v. Koota*, 389 U.S. 241 (1967).

Since the judgment to be entered will be somewhat unusual as to its content, it is requested that the parties prepare and submit such to this Court.

ENTER this 19th day of Novemb:r, 1973.

Pierce Lively, Circuit Judge

Bailey Brown, Chief District Judge

Robert M. McRae, Jr., District Judge